Public Prosecutor v Kesavan a/l Petchayo @ Balakrishnan

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–4 OF 1999
ABDUL WAHAB PATAIL J
18 APRIL 2000

Criminal Law *— Dangerous Drugs — Trafficking in dangerous drugs — Inference of knowledge by conduct of accused — Whether circumstances in which drugs found suggested trafficking — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Procedure *— Police investigation — First information report — First information report not detail — Whether additional evidence giving more details objectionable — Whether absence of details will render evidence of complainant less reliable*

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Whether 'prima facie' means 'beyond reasonable doubt'*

Evidence *— Adverse inference — Failure to call witness — Witness not called by prosecution but offered to defence — Whether adverse inference could be drawn against prosecution — Whether any withholding of evidence — Evidence Act 1950 s 114 illustration (g)*

Evidence *— Witness — Calling of witness by prosecution — Whether prosecution obliged to call all witnesses — Application of adverse inference*

The accused was charged for an offence under s 39B of the Dangerous Drugs Act 1952, punishable under s 39B(2) thereof for trafficking in 11.8g of heroin and 5.2g of monoacetylmorphine. He was arrested while carrying two light brown coloured envelopes under his left arm and walking out of a telephone booth. The police subsequently found in each of the envelopes 50 packets of heroin and monoacetylmorphine. At the time of arrest, he had gone on his knees. He cried and pleaded with the arresting officer saying that the offending exhibits were not his.

Held, convicting the accused and sentencing him to death:

(1) In the absence of clear words as to the standard to be applied, the term 'prima facie' in s 180 of the CPC means 'beyond reasonable doubt' as explained in *Arulpragasan a/l Sundaraju v PP* [1997] 1 MLJ 1 (see p 150H–I).

(2) The calling of numbers of witnesses merely to repeat the same evidence is a waste of judicial time. The rule that the prosecution must adduce all evidence necessary for the unfolding of the narrative of the prosecution's case does not require that every witness be called where it results in repetition, except where corroboration is required (see p 151H–I). A trial is not an occasion for defence counsel to re-investigate the case, for which purpose all witnesses are to be brought before the court to be questioned by him (see p 153H–I).

(3) The adverse presumption in s 114 illus (g) of the Evidence Act does not arise against the prosecution where a person is not called as a witness by the prosecution but is made available to the defence at the end of the prosecution's case. In such a case, there cannot be said to be withholding of evidence (see p 152B–C).

(4) In the absence of any suggestion that a first information report is complete, additional evidence giving more details cannot be objectionable. The use of the words 'relating to' in s 107 of the CPC does not mean that details must be given. It is sufficient if it indicates that an offence has been committed. While a detailed first information report may be valuable evidence, as being less likely to have been embellished, absence of details will not render the evidence of the complainant less reliable but require it to be examined more closely (see p 152D–G).

(5) By inference of his own conduct, the accused knew the nature of the things in the envelopes and that the contents therein were dangerous drugs (see p 157D–E).

(6) The circumstances in which the drugs were found suggested carrying or delivering by the accused within the meaning of 'trafficking' under s 2 of the Dangerous Drugs Act (see p 157E–F).

[Bahasa Malaysia summary

Tertuduh dipertuduhkan dengan satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah s 39B(2) Akta tersebut kerana mengedar 11.8g heroin dan 5.2g monoasetylmorfin. Beliau ditangkap semasa membawa dua sampul surat yang berwarna perang muda di bawah tangan kirinya dan berjalan keluar daripada sebuah pondok telefon. Polis kemudiannya menjumpai 50 bungkusan heroin dan monoasetylmorfin dalam setiap sampul surat. Pada masa ditangkap, beliau telah melutut. Beliau menangis dan merayu kepada pegawai yang menangkap dengan mengatakan bahawa ekshibit yang melanggar undang-undang tersebut bukan kepunyaannya.

Diputuskan, mensabit tertuduh dan menjatuhkan hukuman mati ke atasnya:

(1) Dalam ketiadaan perkataan-perkataan mengenai darjah yang hendak dipakai, terma 'prima facie' dalam s 180 Kanun Acara Jenayah bermakna 'melampaui keraguan munasabah' seperti yang dijelaskan dalam *Arulpragasan a/l Sundaraju v PP* [1997] 1 MLJ 1 (lihat ms 150H–I).

(2) Pemanggilan saksi-saksi semata-mata untuk mengulangi keterangan yang sama adalah suatu pembaziran masa kehakiman. Rukun bahawa pihak pendakwa mesti mengemukakan semua keterangan yang perlu untuk pembukaan huraian kes pihak pendakwa tidak menghendaki setiap saksi dipanggil di mana ia mengakibatkan pengulangan, kecuali di mana sokongan

diperlukan. Perbicaraan bukanlah kesempatan untuk peguam pembelaan untuk menyiasat semula kes, untuk tujuan yang mana semua saksi hendaklah dihadapkan di mahkamah untuk soal balas oleh beliau (lihat ms 153H–I).

(3) Anggapan bertentangan dalam s 114 huraian (g) Akta Keterangan 1950 tidak timbul terhadap pihak pendakwa di mana seseorang tidak dipanggil sebagai saksi oleh pihak pendakwa tetapi diberi peluang kepada pihak pembelaan untuk memanggilnya di penutup kes pihak pendakwa. Dalam kes demikian, tidak boleh dikatakan adanya tahanan keterangan (lihat ms 152B–C).

(4) Dalam ketiadaan apa-apa cadangan bahawa satu laporan maklumat pertama adalah lengkap, keterangan berlebihan yang memberi butir-butir tidak boleh dibantah. Penggunaan kata-kata 'berkenaan' (relating to) dalam s 107 KAJ tidak bererti bahawa butir-butir harus diberikan. Adalah memadai sekiranya ia menunjukkan bahawa satu kesalahan telah berlaku. Sedangkan satu laporan maklumat pertama boleh menjadi keterangan yang berniliai, sebagai berkemungkinan rendah telah dibesar-besarkan, ketiadaan butir-butir tidak akan menyebabkan keterangan pengadu kurang meyakinkan tetapi menghendakinya diperiksa dengan lebih teliti (lihat ms 152D–G).

(5) Melalui inferen perbuatan beliau sendiri, tertuduh mengetahui sifat bahan-bahan dalam sampul surat tersebut dan bahawa kandungan tersebut adalah dadah berbahaya (lihat ms 157D–E).

(6) Keadaan dalam mana dadah itu dijumpai mencadangkan pembawaan atau penghantaran oleh tertuduh dalam lingkungan maksud 'pengedaran' di bawah s 2 Akta Dadah Berbahaya (lihat ms 157E–F).]

Notes

For cases on trafficking of dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 367–376.

For cases on first information report, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2091–2094.

For cases on close of prosecution case, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3288–3320.

For cases on failure to call witness, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 146–163.

For cases on calling of witness by prosecution, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2361–2376.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Kevin John Barlow v PP [1987] 2 CLJ 286 (refd)

Miller v Minister of Pensions [1947] 2 All ER 372 (refd)
Ong Ah Chuan v PP and Koh Chai Cheng v PP [1981] 1 MLJ 64 (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Saw Ah Kow [1993] 2 CLJ 232 (refd)
PP v Sim Ah Ba & Anor [1997] 4 MLJ 47 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)

Legislation referred to

Criminal Procedure Code ss 107, 180, 277
Criminal Procedure Code [India] s 154
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), (2)
Evidence Act 1950 ss 114(g), 133, 134

Asmah bte Musa (Deputy Public Prosecutor, Attorney General's Chambers) for the Public Prosecutor.
M Sathiaseelan (*M Sathia & Associates*) for the accused.

Abdul Wahab Patail J: The accused, Kesavan a/l Petchayo @ Balakrishnan ('the accused') was charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) thereof for trafficking in 11.8g of heroin and 5.2g of monoacetylmorphine on 23 June 1998 at about 4.35pm at Jalan Jambu Golok, Taman City, Jalan Kuching, Kuala Lumpur, in the Federal Territory of Kuala Lumpur.

The prosecution case

The prosecution called four witnesses to give evidence. For simplicity, their evidence is considered as follows:

(a) the arrest;
(b) the exhibits;
(c) the chemist's evidence; and
(d) considerations under s 180 of the Criminal Procedure Code.

The arrest with the exhibits

Sergeant/Major Sreetharan a/l Krishna Nair (SP3) gave evidence that pursuant to information received, he had proceeded with other members of an ambush party comprising Insp Johari bin Abdullah, D/Kpl Mohd Roslan bin Atan, D/Kpl Ramli bin Saad and L/Kpl Mohd Zin bin Tengchen to Jalan Jambu Golok, Taman City, Jalan Kuching, Kuala Lumpur. Upon arrival at about 4pm the ambush party took their positions in three groups. Inspector Johari was near the army personnel flats, while SP3 and D/Kpl Mohd Roslan took positions near the Rukun Tetangga post next to a public telephone booth. The other two police personnel took positions near a restaurant along the same road.

At about 4.30pm SP3 received a call on his walkie talkie from Insp Johari that an Indian was approaching the public telephone next to the BP petrol station holding a package under his arm. He was authorized to act on his discretion whether to stop and search that person. SP3 had not seen the person earlier because a zinc-type fence at the side of the petrol station obstructed his view. He watched as the said Indian person as described approached the Rukun Tetangga post and public telephone booth where the latter made two telephone calls. Standing about six to seven feet away with D/Kpl Mohd Roslan, he saw the person, whom he identified as the accused, place what was then seen to be two brown envelopes onto the telephone box, make two telephone calls but did not speak on the telephone.

Then the accused picked up the two light brown coloured envelopes and placed the same under his left arm to walk out of the telephone booth. At that juncture, SP3 and D/Kpl Mohd Roslan, who were a few feet away, introduced themselves as police, stopped the accused and took custody of the envelopes.

The exhibits — Chain of evidence

According to SP3, the number '50' was found written on the envelopes. They were sealed with masking tape. When the other police personnel arrived at the scene, SP3 upon the direction of Insp Johari took the accused to the side of the Rukun Tetangga post for questioning. The envelopes were opened by SP3 in front of the accused. Each envelope contained 50 packets containing a pink powdery and granular substance (collectively referred to as the exhibits) suspected to be heroin. SP3 checked the identity card of the accused and found that his name was Kesavan a/l Petchayo @ Balakrishnan. The accused was handcuffed and brought to the Sentul police station accompanied by SP3 who carried the exhibits. When they arrived at the Sentul police station, SP3 weighed and marked the exhibits, being the envelopes A and B and the contents A1-A50 and B1-B50, respectively. He found the gross weight to be 396 gms. The exhibits were under his custody at all times. At about 10pm he handed the accused and the exhibits to Inspector Rajendran a/l Kanasan ('SP1'). At the time of handing over the exhibits he was instructed by SP1 to put his signature and the date 23 June 1998 on the envelopes he had marked A and B, and his signature on the plastic packets A1-A50 and B1-B50. This he did in front of SP1 with blue marker ink.

The evidence of SP1 confirmed the evidence of SP3 in respect of the envelopes A and B and the contents, being A1-A50 and B1-B50, which were sealed plastic packets containing a pink granular and powdery substance suspected to be heroin. SP1 confirmed giving the instructions to SP3 as to placing his signature on the plastic packets and his signature and the date on the two envelopes. SP1 then marked the two envelopes with the letters A and B, his signature and the date 23 June 1998 in red marker ink. He then kept the exhibits locked in a steel cabinet in his office to which only he had access. He had taken out the exhibits at 9am on 25 June 1998 for a

photograph to be taken by D/Kpl Zulkifli bin Rashid (SP4). This was confirmed by SP4. The photograph of the exhibits was produced as exh P4 and the negative as exh P4n. SP1 had then placed the exhibits back into the steel cabinet in his office.

The exhibits were next handed over to A/Supt Ismail bin Abdul Rahman at about 3.25pm on 26 June 1998 for the purpose of lifting fingerprints, if any. The exhibits were returned to SP1 at about 10am on 3 August 1998 together with a report. The report was not produced in evidence. I concluded there was no identifiable fingerprints obtained. SP1 had then taken the exhibits back and having placed the envelopes and their contents inside an envelope marked R, and sealed the same, had handed the same at about 11.02am to Ismail bin Talib (SP2), a chemist at the chemistry department, Petaling Jaya. This evidence was confirmed by SP2, who gave a receipt produced in evidence as exh P7.

The chemist — Analysis

SP2 had 18 years' experience in the chemistry department and 12 years in the analysis of dangerous drugs such as heroin, monoacetylmorphine, morphine, cannabis and amphetamines. He confirmed receiving the exhibits from SP1 sealed in an envelope marked R, which was kept in his sole custody, until he performed his analysis.

SP2 labelled the envelope marked R with the laboratory label with the number PJ (FOR) 5098/98-0. The envelope marked R was kept in a locked steel cabinet to which only he had access in the strong room of the Narcotics Section of the Forensics Division of the Chemistry Department in the Chemistry Department, Petaling Jaya, and taken out only for the purpose of conducting analysis. SP2 took out envelope marked Ron 27 August 1998 to conduct his analysis. Inside he found two envelopes marked A and B, inside which envelopes, respectively, were sealed plastic packets A1-A50 and B1-B50. He described the markings that he found on the envelopes and the sealed plastic packets A1-A50 and B1-B50. His description was consistent with the evidence of markings by SP1 and SP3, and was borne out by the exhibits produced, viz, exh P8 (envelope marked R), exhs P8A and P8B (envelopes marked A and B respectively), exhs P8 (A1-A50) and P8 (B1- B50) (plastic packets A1-A50 and B1-B50, respectively).

He found the net weight of the pink granular and powdery substance in A1-A50 to be 148.6gm, and found after analysis, to contain 5.8 gm heroin and 2.6 gm monoacetylmorphine. In the case of the similar substance in B1-B50, the net weight was 147.1gm and upon analysis to contain 6.0gm heroin and 2.6 gm monoacetymolphine. The heroin and monoacetylmorphine were as set out in the First Schedule of the Act.

SP2 explained how he conducted his analysis. He had first taken the pink powdery and granular substance out of the packets A1-A50. Having taken the net weight, he had then blended the substance in a blender so as to homogenize the substance. He explained this was to make the substance physically uniform as to form and size. Samples for analysis were each taken from the homogenized substance.

He conducted three qualitative tests. The first of the series was the colour test comprising the Marquis, Frond's and concentrated nitric acid tests, all three of which returned positive for the presence of heroin and monoacetylmorphine. The second qualitative test was the thin layer chromatography test ('TLC'). The TLC test returned positive for the presence of heroin and monoacetylmorphine. The third qualitative test, gas chromatography mass spectrometry ('GCMS'), also confirmed the presence of heroin and monoacetylmorphine.

To determine the quantity of the heroin and monoacetylmorphine in the substance in packets A1-A50, he conducted the GCMS test on 12 separate samples of the homogenized substance. Then applying mathematical and statistical formulae he obtained the actual lowest percentage of heroin and monoacetylmorphine in the substance, from which he calculated the amount of heroin and monoacetylmorphine in the substance.

The same steps were performed in respect of the substance in plastic packets B1-B50.

After conducting the tests the balance of homogenized substance from A1-A50 and B1-B50 was placed into and sealed inside plastic packets supplied by SP2. These were produced and exhibited as exhs 8A(A) and 8B(B).

Considerations under s 180 of the Criminal Procedure Code

The duty of the court at the end of the prosecution case is provided in s 180 of the Criminal Procedure Code:

> Procedure after conclusion of case for prosecution
>
> (i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (iii) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

The term '*prima facie*' is used to describe the state of the evidence as at the end of the prosecution case. The evidence of the defence is not yet heard. The term itself neither describes nor prescribes the standard of proof to be attained before the defence itself is called. In the absence of clear words as to the standard to be applied, then the interpretation that is the established foundation of our criminal law, and incidentally more liberal to the accused, that is the standard of 'beyond reasonable doubt' as explained in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 (FC) must remain applicable in deciding whether to call for the defence.

The prosecution evidence was that the accused was caught with the two envelopes, which contained dangerous drugs.

A The accused, having custody and control of the envelopes containing the dangerous drugs, by the application of s 37(d) is deemed to have been in possession of the dangerous drugs and to have known the nature of the dangerous drugs until he shall prove to the contrary on a balance of probabilities. The drugs were packaged in a total of 100 small sealed packets, 50 packets in each of two envelopes. On the face of each envelope B was marked '50'. The two envelopes were carried by, and found upon, the accused in a public place, with no evidence from the prosecution witnesses or that it was put to such witnesses in cross examination, that he was holding the same for any purpose, such as his own use, other than in the course of trafficking as defined in s 2 of the Act. In the circumstances, in the C absence of any evidence that he had custody and control for some other reason, it would lead irresistibly to the conclusion that he was trafficking in the said dangerous drugs as defined.

In addition, the evidence of SP3 showed that the accused, upon being stopped and the package taken from him, had gone on his knees, held on to SP3's leg, wept and sought to explain the packages did not belong to him. D According to SP3:

> Masa itu lelaki tersebut terus tergamam dan melutut memegang kaki saya minta tolong. Dia juga menangis dan menjerit 'barang ini bukan saya punya Barang ini bukan saya punya!'

In re-examination SP3 had clarified:

E

> OKT menangis sebelum atau selepas barang kes dibuka?
>
> Dia menangis sebelum dan terus menangis apabila barang kes dibuka. Saya suruh dia tenangkan diri.

The fact that he looked shocked and went on his knees to 'minta tolong' is F damning evidence that he had knowledge of the contents of the two envelopes.

The defence submitted that this evidence could not be accepted because it was a bare statement of SP3.

SP3 had given evidence on oath, which evidence was not contradicted G by or not inconsistent with other evidence. Evidence on oath, even if it appears as a bare assertion or statement, if not contradicted by or not inconsistent with other evidence, not shaken in cross examination or not otherwise incredible, is not defective or to be rejected merely because it appears to be bare. It is evidence that must be taken into consideration. If the evidence of that witness is not challenged or shaken in cross H examination, uncontradicted by or not inconsistent with other evidence, it may not be necessary to call the other witnesses. The calling of numbers of witnesses merely to repeat the same evidence is a waste of judicial time. The rule that the prosecution must adduce all evidence necessary for the unfolding of the narrative of the prosecution case (*Abdullah Zawawi v PP* [1985] 2 MLJ 16 (SC)) does not require that every witness must be called I where it results in repetition, except where corroboration is required. This is consistent with s 134 of the Evidence Act 1950 ('the EA'), which provides that no particular number of witnesses is necessary to prove a particular fact:

Number of Witnesses

No particular number of witnesses shall in any case be required for the proof of any fact.

If there are other witnesses, it is sufficient that such other witnesses be made available to the defence at the end of the prosecution case. If they are not made available, the adverse presumption in s 114(g) of the EA, arising from withholding of evidence, might arise.

The objection that the evidence of SP3 cannot be accepted because it was a bare statement therefore had no basis in law.

I had also considered the following:

(a) that SP3 had not mentioned this fact in his police report;

(b) that SP3 had not noted this down anywhere else;

(c) there was also no evidence to suggest that SP3 had narrated this fact to SP1 who was the investigating officer of the case.

It had not been elicited from SP3 in cross examination that he had recorded everything he had to say in the first information report. If it had been done, doubt may be raised as to any additional evidence he may seek to add, or as to such evidence that contradicts the content of the report. In the absence of any suggestion that the first information report was complete, additional evidence giving more details cannot be objectionable. A first information report is not expected to be a complete or final report. It has been held in respect of s 154 of the Code of Criminal Procedure of India, which is in pari materia with s 107 of the Criminal Procedure Code, that the use of the words 'relating to' does not mean that details must be given, it being sufficient if it indicates that an offence has been committed (*Bhopat* AIR 1973 SC 446, *Podda Naravana* AIR 1975 SC 1252). Thus while a detailed first information report might have been valuable evidence, as being less likely to have been embellished, absence of details does not render the evidence of the complainant necessarily less reliable, but requires it to be examined more closely. A first information report is merely corroborative in nature, it is not substantive evidence: see *Sarkar on Criminal Procedure* (6th Ed) at pp 364–365.

A similar reasoning applies to entries in the officer's diary. Whilst it is true that a written record would have made the decision for the court as to his credibility much easier and is therefore much to be encouraged, the fact remains there is no statutory requirement he must write every detail in any record.

Notes in a diary or a narration to another officer cannot in any case be adduced as substantive proof of fact, but only for the purpose of supporting the credibility of the witness. Their absence does not mean that the evidence he now gives on oath is not true. That he has not noted it down is neither here nor there in the absence of any evidence or admission that he cannot remember anything unless it is written down in his diary. Whether he ought to have written it down in his diary is an entirely different matter. That is a question that has nothing to do with what a witness can or cannot

A remember. Nor, for similar reasons, is it necessarily fatal that SP3 had not narrated the event to the investigating officer SP1.

The failure by the prosecution to call D/Kpl Roslan bin Atan, who was with SP3 throughout the event, bears consideration. The basis of the defence argument is that he could give evidence to corroborate or contradict B that of SP3.

In deciding whether to accept the evidence of SP3, the court will consider carefully his demeanour, whether his testimony is consistent throughout, and whether it is not inconsistent with the other evidence adduced. The real issue is not that D/Kpl Roslan bin Atan ought to have C been called because he could either corroborate or contradict SP3, but accepting that D/Kpl Roslan bin Atan is a possible witness, whether there is an obligation for the prosecution to call all the possible witnesses or whether the evidence of SP3 in law requires corroboration.

Section 134 of the EA, as cited above does not specifically require any particular number of witnesses for the proof of any given fact. In *Ti Chuee* D *Hiang v PP* [1995] 2 MLJ 433 (SC) at p 440 it was stated:

> ... It is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at trial (see eg *Adel Muhammad el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144) the most basic limitation upon E prosecutorial discretion in the presentation of a case is that it also has a duty to call all the necessary witnesses to establish proof against that accused beyond all reasonable doubt and if in the exercise of its discretion, it fails to fulfil this obligation, the accused must be acquitted.

It is for the prosecution therefore to decide to call such witnesses, as it in its F sole discretion considers necessary to prove its case beyond reasonable doubt. But it would be extending the rule too far to say that the prosecution has to call witnesses simply because he could either corroborate or contradict another witness or for the purpose of giving the accused an opportunity to cross-examine that person.

Otherwise, only such credible evidence as is necessary to the unfolding G of the narrative of the prosecution is necessary, upon the risk of dismissal of the case, to be produced: *Abdullah Zawawi v PP*; *PP v Chee Kon Fatt* [1991] 3 CLJ 2564; *PP v Sim Ah Ba & Anor* [1997] 4 MLJ 47 following *Ti Chuee Hiang v PP*. There must be evidence in support of all of the narrative of the prosecution case, and any material gap must result in an acquittal. *PP v Saw Ah Kow* [1993] 2 CLJ 232 declared that it is trite law that the requirements H of strict proof in a criminal case must be adhered to and cannot be relaxed to bridge any material gap in the prosecution case.

A trial is thus not an occasion for counsel for the defence to 're-investigate' a case, for which purpose all witnesses are to be brought before the court to be questioned by him. Counsel is expected to have taken I instructions from his client as to the defences from the accused person's point of view, where guided by the instructions, he ought to have made his preparations, and in the trial set out and seek to establish the defences by

raising a reasonable doubt through cross examination; and if the defence is called, call his witnesses for the same purpose. A

The prosecution had made available to the defence D/Kpl Roslan bin Atan at the close of its case. The adverse inference that might be attracted by the failure of the prosecution to call a person as a witness is therefore negated by making available such person to the defence because it cannot then be said that evidence is being withheld. B

To summarize, SP3 is an independent witness who has given evidence on oath, and whose evidence was not shaken in cross examination. D/Kpl Roslan bin Atan, if called, would only serve to confirm or corroborate the evidence of SP3. There is no requirement that the evidence of SP3 must be corroborated. The failure to call D/Kpl Roslan bin Atan as a witness therefore does not leave a gap in the prosecution case, since there is already the evidence of SP3. C

That there is a gap by the failure to call A/Supt Ismail bin Abdul Rahman who tested the exhibits for fingerprints appears to be more arguable. Since, however, the prosecution did not adduce evidence of fingerprints, the importance of this person is only as to the chain of evidence of the exhibits. The exhibits having been delivered to and received back from A/Supt Ismail bin Abdul Rahman by the same person, ie SP1, and particularly in the absence of any suggestion put to SP1 that the exhibits he received back were not the same exhibits, in the same condition or had been tampered with, the failure to call A/Supt Ismail bin Abdul Rahman is not a material gap or omission. It was not put to SP1 that he did not hand over the exhibits to A/Supt Ismail bin Abdul Rahman or that he did not receive the exhibits later from the same person. These questions not having been put to SP1, any submission of possible tampering is nothing but supposition and carries no weight. A/Supt Ismail bin Abdul Rahman was also made available to the defence. No adverse inference needs therefore to be considered. D E F

I have considered the significance of the fact that SP3 had not entered in any record specifically that the accused had pleaded for his assistance before the envelope was opened. Evidence of SP3 in court, in any case, must be oral and on oath. Any such record is inadmissible as probative evidence. It is admissible to support his credibility, but this arises only where the credibility as to that part of the evidence is specifically challenged and needs to be supported because of any uncertainty in that regard. His answers to questions in court were forthright and unhesitating, even as to the embarrassing aspect that it would have stood him in better stead if he had taken the trouble to record this part of his evidence in a notebook, or could say he had informed the investigating officer of it. I had a clear sense and perception from SP3 that he is telling an unvarnished truth, and despite its imperfections, he had not tried to make up any story to make it appear better. G H

During cross examination, it was put to SP1 that in the course of investigation, one T Sathiaseelen ('Sathiaseelen') did say the package and contents belonged to him, and that the said Sathiaseelen was arrested on the I

same occasion. SP1 also said the same person, Sathiaseelen, told him that the accused did not know the contents of the two envelopes. This occurred when SP1 took the statement of Sathiaseelen. In re-examination, it was explained by SP3 that another group in the vicinity arrested Sathiaseelen. The prosecution did not call Sathiaseelen.

If Sathiaseelen was involved with the accused, his evidence is accomplice evidence. While an accomplice is a competent witness and his evidence given weight even without corroboration (see s 133 of the EA), the said Act also provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It serves to illustrate the caution that must be exercised in evaluating the evidence of an accomplice. Accomplices do not necessarily always seek to place the blame on another to save their own skin. Some may choose to accept all the blame to save a friend. The court must therefore consider all of the circumstances of the case.

SP1 had said in cross examination that Sathiaseelen did say the dangerous drugs in the envelopes belonged to him. He also admitted in cross examination that Sathiaseelen told him the accused did not know about the contents of the envelopes. This prompted re-examination on other information Sathiaseelen allegedly told SP1, and defence was allowed further cross examination on the said evidence.

While the fact the accused is not the owner of the dangerous drugs is not a defence in a charge for trafficking, the admission by SP1 of what Sathiaseelen told him would tend to show that the accused had no knowledge of the contents of the two envelopes. However, that Sathiaseelen said the accused had no knowledge, coming from SP1, is only direct evidence that such statement was made but is hearsay as to the truth of the statement that the accused had no knowledge. The admissibility of the statement by Sathiaseelen, who was under arrest at the time, is not established.

In the circumstances, the statement of Sathiaseelen to SP1, being hearsay, cannot be sufficient to raise a reasonable doubt upon the prosecution case at this stage even though it is admitted by SP1 as having been said by Sathiaseelen.

Finally, I had also considered the failure by the prosecution to call Sathiaseelen to give evidence. Since he was offered to the defence, the question of an adverse inference cannot arise because there is no withholding of evidence. The remaining question is whether there is a gap in the prosecution case as a result of the failure to call him. While there is a strict duty upon the prosecution to call witnesses to give evidence in respect of all the elements of the charge, that duty does not extend to having to call all the possible witnesses in a case, including of those whose evidence might be against the prosecution. The Criminal Procedure Code has provided for an orderly presentation of evidence: that the prosecution calls its witnesses in support of its case, and if the defence is called, then the defence calls its witnesses. Sathiaseelen may well be an important witness for the defence, if his evidence is to show the accused had no knowledge, but it is for the defence then to call him as a witness if the defence is called.

It was put to SP1 that it was important to find out who wrote '50' on the envelopes. He agreed. The opinion of SP1 is irrelevant, since it is a matter solely for the court to decide in the light of the evidence whether it is important. While knowing who wrote '50' on the envelopes may show that the writer of that number knows there were 50 packets, that is a separate matter. For the purpose of this trial it is necessary to bear in mind there is no allegation that the accused wrote the number '50' on the envelopes.

While SP1 had said no one else was arrested by his ambush group, it was evident another person was also arrested at the same location. Does this make the evidence of SP1 unreliable? SP1 readily agreed OKT mentioned Ah Pui in his statement on 24 June 1998. SP1 explained SP3 did not mention Sathiaseelen at time he handed over the exhibits and the accused, but later found Sathiaseelen to be one Ah Pui, who is now detained in Simpang Renggam, Johor. SP1 said he took Ah Pui's statement where Ah Pui described the accused as KC; and that Sathiaseelen told SP1 the Bukit Aman narcotics police arrested him. The explanation is consistent with his evidence and there is no reason in the evidence to doubt his explanation.

It was submitted that:

> Tentang penangkapan Sathiaseelen — mengikut keterangan SP1 sehingga dia beri keterangan dia tidak tahu nama pegawai yang menangkap Sathiaseelen. Mengikut keterangan SP3 dalam soal balas, dia kata ada satu lagi team yang terlibat di dalam penangkapan Sathiaseelen. Soalan timbul mengapa pegawai ini tidak dioffer kepada pihak pembelaan.

It was submitted that the failure to call this officer as a witness or to offer him to the defence raises an adverse presumption. As mentioned earlier, SP3 had said there was another team. SP3 readily gave the name of the leader of that team: Insp Ng Soon Wah. However, whether any evidence has been taken from that officer so as to give rise to the presumption there is a withholding is not established. Neither is it clear what is the adverse presumption to be made and the relevance of it to the present case. In any case there is no evidence SP1 has direct knowledge of the arrest in this case, and SP3 was not challenged that his testimony that there was another team was not true.

SP1 had admitted there was no search list. The defence submitted that this is important. However, there was no doubt the exhibits were the same at all times and had been positively identified. A search list is an acknowledgment of the items taken by a police officer during a search. The absence of a search list, where there are few other items taken at the same time, is unlikely to cause confusion and therefore does not affect the identification of the items taken.

It was submitted at the end of the prosecution case that:

> Mengikut keterangan SP1 — beliau telah setuju dengan cadangan pembelaan bahawa yang kena tuduh tidak ada kena mengena dengan isu kandungan bungkusan yang dirampas dari OKT. SP1 juga setuju OKT memang tidak ketahui dengan isi kandungan yang dirampas.

The submission is not entirely correct. What was put to the witness SP1 was as follows:

> Cadang dalam penyiasatan kamu, Sathiaseelen telah pun maklumkan isi kandungan P8, P8A dan P8B sebenarnya kepunyaan Sathiaseelen.
>
> Ya. Sathiaseelen mengaku.
>
> Cadang bahawa Sathiaseelen telah katakan OKT tidak tahu menahu tentang isi kandungan P8A dan P8B?
>
> Ya.

Although SP1 had confirmed that Sathiaseelen did tell him that the exhibits belonged to him, and the accused did not know anything about the contents of P8A and P8B, that does not mean that the accused had nothing to do with the said exhibits, keeping in mind that the charge against the accused is not ownership of the dangerous drugs, but that the accused had possession and was trafficking in the said drugs.

It is clear from the cross examination and the submissions that no reasonable doubt has been raised in the prosecution case, in which it was clearly shown by direct evidence that the accused had:

(a) by inference by his own conduct (*PP v Badrulsham bin Baharom* [1988] 2 MLJ 585. *Kevin John Barlow v PP* [1987] 2 CLJ 286) that he knew of the nature of the thing in the envelopes, that they were dangerous drugs shows knowledge (by inference: *Chan Pean Leon v PP* [1956] MLJ 237) and possession of the dangerous drugs; and

(b) from the amount, manner of packaging, absence of any evidence that the said dangerous drugs were for his own use, and the circumstances he went directly to the public telephone booth, made calls and without having made conversation, proceeded forth suggests carrying or delivering within the meaning of trafficking in s 2 of the Act (see *Teh Geok Hock v PP* [1989] 3 MLJ 162; *Ong Ah Chuan v PP and Koh Chai Cheng v PP* [1981] 1 MLJ 64 (PC)):

and supported by the presumption either:

(i) by the fact he had custody and control of the two envelopes, he is presumed, until the contrary is proved, to have possession and knew of the nature of the dangerous drugs contained therein; or alternatively'

(ii) by the quantity of 17.0 gm of heroin and monoacetylmorphine, he is presumed, until the contrary is proved, to be trafficking in the said dangerous drugs,

the court therefore finds that the prosecution had made out a *prima facie* case in accordance with s 180(i) of the Criminal Procedure Code, and in accordance with s 180(iii) thereof calls upon the accused to enter upon his defence.

The defence case

In this part, the court is required by s 182A of the Criminal Procedure Code to consider all of the evidence adduced before it and decide whether the

prosecution has proved its case beyond reasonable doubt. To put it another way, the court must decide whether the defence has raised a reasonable doubt. As to the meaning of what is a reasonable doubt, I was guided by the words of Denning J (as he then was) in *Miller v Minister of Pensions* [1947] 2 All ER 372 where his Lordship said (at p 373):

> [The degree of cogency] ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

A reasonable doubt is thus not a doubt that is merely theoretically possible, but one that given all of the facts of the case is a doubt that is possible but not in the least probable. While it is always possible with a little ingenuity to create a story which raises a possible or theoretical doubt, the factual nature and circumstances of the particular case may show that such possible or theoretical doubt was not in the least probable in that case, and thus no reasonable doubt arises. If such possible or theoretical doubt is in the least probable, then the court must hold there is reasonable doubt. However, mere denial, without other proof to reasonably dislodge the prosecution's evidence is insufficient: *PP v Ling Tee Huah* [1982] 2 MLJ 324.

The version by the accused (SD1) as to how he came to be in possession of the two envelopes is that after spending some time with the accused in the city with Sathiaseelen (SD2), the latter received a telephone call, after which the latter drove to Taman Sri Segambut, and thence to a BP petrol station on Jalan Jambu Golok, Taman City, Off Jalan Kuching:

> Apabila kami sampai di BP station beliau telah memberhentikan keretanya dan menyuruh saya turun dan memberikan saya dua sampul surat untuk dipegang. Beliau menyuruh saya memegang sampul surat itu dan menunggu beliau kerana dia hendak ke 7-Eleven yang terletak di Jalan Jambu Golok untuk berjumpa dengan kawannya. Dan kemudian beliau akan datang dan mengambil balik sampul surat tersebut.
>
> Selepas itu beliau terus menuju ke 7-Eleven dan saya membawa kedua-dua sampul surat tersebut dan meletakkannya di pondok talipon di hadapan stesyen minyak BP dan kemudian saya menunggu untuk ketibaan beliau. Sathiaseelen cuma suruh saya tunggu di kawasan BP sahaja.
>
> Selepas letak kedua-dua sampul surat di pondok talipon, saya menunggu beliau lebih kurang 20 minit dan kerana beliau tidak muncul maka saya cuba menghubungi beliau dengan menalipon beliau. Saya gunakan talipon di pondok talipon.
>
> Anggaran lebih kurang 40m antara Stesyen BP dan 7-Eleven.

The version is bare of any explanation why he had to hold the two envelopes. If the purpose is to show that the real owner of the items in the two envelopes is Sathiaseelen, and by inference the accused had no knowledge of the contents, this part of his story is weak. It is difficult to

A accept tht Sathiaseelen had to leave the accused and the two envelopes by a public telephone booth or petrol station because he had to meet someone privately in a 7-Eleven only 40m away.

Sathiaseelen appears to support and expand upon the version of the accused. He said in his testimony that:

B

> Semasa serah dua bungkusan itu kepada OKT selepas turunkan dia, saya tidak sempat beritahu OKT apakah isi kandungan dalam kedua-dua sampul surat itu.

He also said:

C

> Saya kenali pegawai penyiasat kes ini. Namanya Insp Tuan Rajendran. Dia ada rakam percakapan saya. Saya ada beritahu kepada Tuan Rajendran bahawa tertuduh tidak kena mengena dengan isi kandungan kedua-dua sampul surat itu.

He answered in cross examination as follows:

D

> Tadi kata sebelum turunkan Kesavan, kamu sempat beritahu dia kamu ingin jumpa kawan kamu, ia atau tidak?
>
> Setelah saya turunkan Kesavan saya ada beritahu Kesavan bahawa saya hendak berjumpa dengan kawan saya.
>
> Saya kata bahawa kamu sempat beritahu Kesavan barang dalam envelop-envelop itu adalah dadah?

E

> Saya nafikan saya ada memberitahu Kesavan bahawa ada dadah dalam kedua-dua sampul surat itu.

The question is how far the evidence of Sathiaseelen supports a reasonable doubt. He did not explain why the accused had to be left at the public telephone booth or the petrol station while he, Sathiaseelen, went to see his friend at 7-Eleven. Nothing in the evidence suggests any urgency to proceed F to the 7-Eleven such that he could not tell the accused why the latter had to wait near the phone booth. He had to wait in his car at the 7-Eleven for his friend to arrive, indeed in cross examination he agreed there was no good reason:

G

> Saya kata adalah tidak munasabah kamu beri dadah itu kepada Kesavan hanya untuk memegangnya kerana kamu sendiri boleh membawanya dalam kereta kamu dengan meninggalkannya dalam kereta atau sendiri memegangnya kemudian? Setuju atau tidak? [Saksi minta soalan diulangi.]
>
> Setuju.

In deciding as to what level of credibility to ascribe to the evidence of H Sathiaseelen, it is necessary to consider other parts of his evidence. Sathiaseelen said that the person who arrested him was Sgt Major Sreetharan:

I

> Semasa saya sampai di 7-Eleven, dan semasa saya masih dalam kereta menunggu 'Ayah', saya nampak seorang lelaki India datang ke kereta saya, menuju ke sebelah kereta saya dan telah meminta saya turun dari kereta kerana lelaki India tersebut ingin cakap dengan saya. Kemudian saya telah beritahu dia bahawa saya tidak mengenalinya tetapi saya cuma ingin bercakap dengan kawan saya bernama 'Ayah'. Kemudian saya telah beritahu dia dan

saya menoleh ke belakang untuk menengok kawan saya bernama 'Ayah'. Semasa itu, saya nampak seorang lelaki Melayu mengacukan pistol ke leher saya. Kemudian pegawai polis Melayu menyuruh saya mengalih kedudukan saya ke sebelah pemandu dan terus menggarikan saya. Lelaki India yang menggarikan saya. Lelaki India itu saya tidak kenali masa itu, tetapi selepas itu saya tahu nama lelaki itu ialah Sjn Mejar Sreetharan.

Kawan saya bernama 'Ayah' telah dibawa oleh pihak polis. Selepas saya digari mereka minta saya duduk di belakang kereta saya. Kemudian kereta saya telah dibawa oleh pihak polis. Mereka telah membawa saya ke dewan yang terdapat di taman di situ. Sjn Mejar Sreetharan tidak mengikuti saya masa itu.

Sgt Major Sreetharan is SP3. SP3 was earlier only cross-examined as follows:

Pada tarikh tersebut adakah orang awam lain ditangkap di kawasan itu?

Ada.

Siapa dia?

Satu lagi team dari Bukit Aman ada buat tangkapan di kawasan itu.

Kamu tahu?

Saya tahu satu laki-laki India dengan nama panggilan 'Ah Pui' kena tangkap di kawasan itu.

Tahu nama penuhnya sekarang?

Saya tidak pasti — cuma tahu 'Sathiaseelen'.

Tahu siapa menangkapnya?

Team diketuai oleh Insp Ng Soon Wah.

Semasa menangkap OKT — selain Sathiaseelen, ada lagi seorang digelar 'Ayah' ada di sana?

Saya tidak tahu.

Dari P6 — boleh tunjuk di mana Sathiaseelen ditangkap?

Di hadapan 7-Eleven.

It was not disputed against SP3 then or at any other time by the defence that it was a Malay and SP3 and not Insp Ng Soon Wah who arrested the accused. Even after Sathiaseelen had given evidence, the defence did not recall SP3 for the purpose of putting the issue to him.

The failure to put the defence's version of events to relevant prosecution witnesses occurs not only in the evidence of Sathiaseelen but also of the accused, the accused himself.

According to the accused, in his examination in chief:

Selepas letak kedua-dua sampul surat di pondok talipon, saya menunggu beliau lebih kurang 20 minit dan kerana beliau tidak muncul maka saya cuba menghubungi beliau dengan menalipon beliau. Saya gunakan talipon di pondok talipon.

Selepas itu datang seorang lelaki India lalu mengenalkan dirinya sebagai polis dan menanya kepada saya kepunyaan siapakah kedua-dua sampul surat tersebut. Saya menjawab kedua-dua sampul surat tersebut bukanlah

A kepunyaan saya malah ia adalah kepunyaan kawan saya yang telah pergi ke 7-Eleven dan akan kembali balik untuk mendapatkan sampul-sampul surat tersebut.

SP3 had earlier given evidence that differs from the above version:

B Pada jam lebih kurang 4.30pm Insp Johari telah berhubung saya melalui 'walkie talkie' dan bagi tahu ada seorang laki-laki India dari stesyen minyak BP sedang menuju ke pondok talipon. Lelaki India itu ada mengepit sesuatu bungkusan. Insp Johari juga bagi tahu saya 'Kalau awak syaki lelaki itu, awak buat pemeriksaan ke atasnya'. Saya perhatikan lelaki India itu menghala dari BP stesyen minyak, menyeberangi jalan dan menghala ke pondok talipon awam. Masa itu juga saya dapati barang yang dikepit di lengan kirinya adalah C satu envelope (sampul surat) berwarna kuning langsat. Lelaki itu pergi ke pondok talipon, meletakkan sampul surat di atas kotak talipon. Masa itu saya perhatikan dua sampul surat di atas kotak talipon. Lepas itu lelaki itu buat panggilan dua kali. Saya masa itu lebih kurang 7 kaki dari dia. Tidak ada jawapan kepada kedua panggilan talipon oleh dia kerana dia tidak berbual dengan sesiapa.

D Lepas itu dia letak balik gagang talipon, ambil balik kedua-dua sampul surat, kepitkan di ketiak kiri dan keluar dari pondok talipon. Masa itu juga saya dan Det Kpl Roslan yang berhampiran memperkenalkan diri sebagai polis dan menahan lelaki tersebut.

The defence had not put the accused's version to SP3. In other words, the defence had not tested or challenged this part of the evidence of SP3, that E the accused waited about 20 minutes before he made telephone calls, and that only one Indian person and not two, being one Indian and one Malay, who approached him and introduced himself as police. Conversely, the failure to put the defence's version of this part of the evidence means that the evidence of the accused is untested against SP3. If the defence's version is correct, there is no reason not to test it against SP3. Brought up only later F in his testimony, and without having laid it out and tested against SP3 shows it to be an afterthought likely embroidered after having heard the prosecution evidence, and not worthy of consideration as a possible truthful version of events.

The accused's evidence continued as follows:

G Selepas itu lelaki India itu memberkas saya dan bertanyakan kepada saya apa yang terdapat di dalam kedua-dua sampul surat tersebut. Dan saya memberitahunya yang saya tidak tahu akan kandungannya. Saya memberitahu beliau saya tidak sempat bertanyakan kawan saya apakah kandungan kedua-dua sampul surat tersebut.

H Maksud memberkas adalah beliau telah menggari saya.

The relevant part of the cross examination of the arresting officer, SP3, is as follows:

Cadang keterangan kamu bahawa OKT melutut dan menangis, dan minta tolong sebenarnya tidak berlaku?

I Saya tidak setuju.

Cadang semasa OKT ditangkap dia telah menjawab kepada soalan kamu bahawa bungkusan itu bukanlah dia punya?

Memang dia sebut bungkusan itu bukan dia punya.

Dia juga jawab bungkusan tersebut sebenarnya telah diserahkan oleh seorang bernama Ah Pui?

OKT tidak kata itu semasa ditangkap, tetapi di balai dia ada sebut barang itu Ah Pui yang punya.

Cadang apabila dia kata Ah Pui punya, kamu jawab kamu memang tahu itu kerana dia bukan sasaran kamu?

Saya tidak ada jawab barang itu Ah Pui punya. Saya tidak ada beritabu dia saya tahu barang itu bukan dia punya.

The cross examination dealt with ownership of the two envelopes, and it was put to SP3 the accused did not weep, kneel before him and asked for his help. It was not put to SP3 that the accused had told him that the accused did not know what was inside the envelopes, as he now alleges in his evidence. Instead, as to knowledge, it was put to SP3 that Sathiaseelen had told him that he himself did not know what was inside the envelopes, to which SP3 disagreed:

Cadang bahawa kamu sendiri menyoal Sathiaseelen, Sathiaseelen telah beritahu dia sendiri tidak tahu isi kandungan tersebut.

Tidak setuju. Sathiaseelen ada bagi tahu saya OKT tahu apa yang dia buat dan Sathiaseelen ada mengakui Sathiaseelen ada beri RM50 kepada OKT.

When Sathiaseelen gave evidence he did not say that he himself did not know the contents of the envelopes. One can only conclude then the answers by SP3 were accepted and were correct.

The accused continued:

... Beliau bawa saya ke pondok Rukun Tetangga yang terletak bersebelahan pondok talipon lalu membuka kedua-dua sampul surat tersebut dan menunjukkan kandungannya serta beritahu saya bahawa kandungannya merupakan dadah.

Kemudian saya terkejut lalu menangis dan meminta tolong dengannya.

His evidence that he was surprised, wept and asked SP3 for help contradicts his own defence laid out in the cross examination of SP3 as follows:

Kamu kata dia melutut minta tolong?

Betul.

Dia juga menangis pada masa itu?

Betul.

Adakah kamu setuju sebagai orang berpengalaman keterangan ini penting?

Setuju.

Kamu ada sebutkan 'Barang ini bukan saya punya', 'dia melutut' dan 'dia menangis' dalam laporan polis yang kamu buat?

Tidak.

Ada catit perkara-perkara ini dalam poket book kamu?

Tidak.

A Cadang keterangan kamu bahawa OKT melutut dan menangis, dan minta tolong sebenarnya tidak berlaku?

Saya tidak setuju.

In re-examination SP3 reiterated:

B OKT menangis sebelum atau selepas barang kes dibuka?

Dia menangis sebelum dan terus menangis apabila barang kes dibuka. Saya suruh dia tenangkan diri.

The original line of defence suggested by the cross examination is that the accused did not kneel, weep and ask for help. The change as evident from his evidence shows contradictory changes in the defence, indicating that C cross examination was undertaken not necessarily for the purpose of faithfully laying out the defence and to test the prosecution evidence against it, but is of an exploratory nature, seeking out the prosecution evidence. The failure by counsel to clearly set out a consistent line of defence leads only to the conclusion that the defences were not *bona fide* but were made D up and tried out as and when an opportunity appears.

The accused had continued his evidence as follows:

... Maka beliau cuba menenangkan saya dengan memberitahu saya bahawa beliau tahu barang itu adalah kepunyaan siapa, kerana sebelum saya ditangkap beliau telah menangkap seorang lelaki India bernama Sathiaseelen E yang juga dikenali sebagai Ah Pui di hadapan 7-Eleven. Dan beliau juga memberitahu saya supaya tidak perlu takut kerana Sathiaseelen telah ditangkap dan beliau akan cuba melepaskan saya kerana mengikut kata beliau, saya bukanlah sasaran beliau pada hari tersebut.

These assertions had not been put to SP3 when cross-examined for the defence. SP3 had been cross-examined previously as follows:

F Cadang apabila dia kata Ah Pui punya, kamu jawab kamu memang tahu itu kerana dia bukan sasaran kamu?

Saya tidak ada jawab barang itu Ah Pui punya. Saya tidak ada beritahu dia saya tahu barang itu bukan dia punya.

G Unlike the evidence of the accused which contained contradictions between his evidence and his defence as laid out in cross examination, SP3 had given his testimony, including in cross examination, with plain, simple and forthright answers to the questions put to him, without contradictions. There were no signs of any hesitation or delay in his answers, which might suggest the possibility of a calculated reply. He readily admitted to errors H such as:

Ada beri amaran sebelum dia buat pengakuan ini?

Tidak.

Ada kamu sendiri catit di mana-mana apa dikatakan itu?

I Tidak.

Kamu sendiri tahu tarikh dan masa Sathiaseelen buat pengakuan ini?

Tidak tahu. Lebih satu, dua minggu.

When it was put to him that the real objective of the ambush on that day was one Ah Pui, his answer was equally forthright and reasonable:

> Pada hari tangkapan, tujuan ambush adalah untuk tangkap Ah Pui dan kamu buat serang hendap di hadapan 7-Eleven — bukan seperti keterangan kamu hari ini?
>
> Tujuan kami memang untuk menangkap Ah Pui. Team dipecah dua, satu untuk tangkap Ah Pui, dan yang satu lagi untuk tangkap siapa yang akan datang juga.

In another part of the cross examination of SP3 was this exchange:

> Semasa pengadu menyerahkan OKT dan barang-barang kes, adakah dia maklumkan seorang lelaki lain bernama Sathiaseelen?
>
> Tidak.
>
> Dalam penyiasatan — ada dapat mengesahkan siapa Ah Pui?
>
> Ya. Dia ialah Sathiaseelen a/l Thiravidamany.

The above shows that in giving evidence he listened to the first question put to him before answering precisely, 'Tidak' when a witness less concerned with precision would most likely have answered 'Ada' although the information as to the real name of 'Ah Pui' was given later in investigations.

Having examined closely the evidence of SP3 against all of the evidence adduced before the court, I had no hesitation to accept his answers as precise and truthful, not only in the prosecution stage of the case but also after reconsidering it in the light of all of the evidence and in particular those parts of his evidence which where contradicted by the accused or Sathiaseelen in their evidence.

Taking the issue one step further, I had considered whether, even though the court might not believe the evidence of the accused, his evidence raises a reasonable doubt in the prosecution case. I had directed my mind to the question whether, in the light of all of the evidence the version by the accused, that he was put by the side of the road to hold two envelopes by Sathiaseelen in such a hurry he had no time to tell the accused what were in the envelopes so that the latter could meet someone in a 7-Eleven 40m away is in the least probable. The evidence shows there was no reason to hurry since there is no evidence that the person he was to meet was already waiting impatiently. Sathiaseelen himself said he was waiting in his car at the 7-Eleven. Furthermore, if indeed Sathiaseelen wanted the two envelopes not to be seen by the person he was going to meet, he could easily have kept the envelopes in the boot of the car or in the car. He could even have left the accused sitting in the car.

SP3 had given evidence as follows:

> ... Lelaki India itu ada mengepit sesuatu bungkusan. Insp Johari juga bagi tahu saya 'kalau awak syaki lelaki itu, awak buat pemeriksaan ke atasnya'. Saya perhatikan lelaki India itu menghala dari BP stesyen minyak, menyeberangi jalan dan menghala ke pondok talipon awam. Masa itu juga saya dapati barang yang dikepit di lengan kirinya adalah satu envelope (sampul surat) berwarna kuning langsat. Lelaki itu pergi ke pondok talipon, meletakkan sampul surat

A di atas kotak talipon. Masa itu saya perhatikan dua sampul surat di atas kotak talipon. Lepas itu lelaki itu buat panggilan dua kali. Saya masa itu lebih kurang 7 kaki dari dia. Tidak ada jawapan kepada kedua panggilan talipon oleh dia kerana dia tidak berbual dengan sesiapa.

Lepas itu dia letak balik gagang talipon, ambil balik kedua-dua sampul surat, kepitkan di ketiak kiri dan keluar dari pondok talipon. Masa itu juga B saya dan Det Kpl Roslan yang berhampiran memperkenalkan diri sebagai polis dan menahan lelaki tersebut.

In other words, the accused had proceeded to the telephone booth directly from the BP petrol station, put the envelopes upon the telephone box, made two calls but there was no reply, and he proceeded to walk off with the C envelopes.

The accused himself said:

Apabila kami sampai di BP station beliau telah memberhentikan keretanya dan menyuruh saya turun dan memberikan saya dua sampul surat untuk dipegang. Beliau menyuruh saya memegang sampul surat itu dan menunggu D beliau kerana dia hendak ke 7-Eleven yang terletak di Jalan Jambu Golok untuk berjumpa dengan kawannya. Dan kemudian beliau akan datang dan mengambil balik sampul surat tersebut.

Selepas itu beliau terus menuju ke 7-Eleven dan saya membawa kedua-dua sampul surat tersebut dan meletakkannya di pondok talipon di hadapan stesyen minyak BP dan kemudian saya menunggu untuk ketibaan beliau. E Sathiaseelen cuma suruh saya tunggu di kawasan BP sahaja.

Selepas letak kedua-dua sampul surat di pondok talipon, saya menunggu beliau lebih kurang 20 minit dan kerana beliau tidak muncul maka saya cuba menghubungi beliau dengan menalipon beliau. Saya gunakan talipon di pondok talipon.

F The accused's version in his testimony is that he was waiting at the telephone booth for about 20 minutes before calling Sathiaseelen. Yet, SP3 was not challenged that he was wrong in saying that the accused placed the envelopes on the telephone box and made two telephone calls. It was not suggested to SP3 that the accused waited about 20 minutes before making G a telephone call. The accused did not say whether he made one or two calls. Sathiaseelen, as witness for the defence, did not confirm that the accused did call him. The story of waiting 20 minutes can only be an afterthought made up after hearing the prosecution case, to support the story that he was waiting for Sathiaseelen and had called Sathiaseelen, and there is no truth in it.

H Without the story of waiting 20 minutes, the evidence remains that having been dropped off at the BP petrol station, he had proceeded directly to the public phone booth to make telephone calls while Sathiaseelen waited at the 7-Eleven and had then proceeded forth with the envelopes when he was intercepted and stopped by SP3. What emerges from this is that the I accused knew and was involved far more than that suggested by the testimony he had created to give in court.

Sathiaseelen a/l Thiravidamany (SD2) gave evidence for the accused.

The defence as laid out to SP1 is that Sathiaseelen had admitted that the contents of the two envelopes belonged to him and that the accused did not know of the nature of the contents. Sathiaseelen said in his testimony that:

> Semasa serah dua bungkusan itu kepada OKT selepas turunkan dia, saya tidak sempat beritahu OKT apakah isi kandungan dalam kedua-dua sampul surat itu.

Clearly Sathiaseelen now did not say directly that the dangerous drugs belonged to him but only implied from the above he knew what the contents were.

To assess whether this testimony of Sathiaseelen raises a reasonable doubt, his evidence must be considered as a whole. Now, at the beginning of his testimony he said:

> Hari tersebut jam lebih kurang 3.30pm saya telah menurunkan OKT dan telah berikan dua sampul surat kepadanya dan minta dia memegangnya dan saya telah beritahu dia saya akan pergi jumpa kawan sebentar. Saya telah turunkan OKT dan telah beritahu saya akan pergi ke 7-Eleven untuk bertemu kawan saya.
>
> Saya telah turunkan OKT di kawasan BP Jalan Kuching. Jalan itu dikenali Jalan Kuching dan berhampiran dengan stesyen BP. Saya tidak tahu nama taman di kawasan BP tersebut. 7-Eleven dengan stesyen BP — jaraknya adalah dekat.
>
> Selepas turunkan OKT, saya terus ke 7-Eleven untuk bertemu kawan saya. Saya dapat bertemu kawan saya di 7-Eleven pada hari itu. Nama sebenarnya ialah Chandrasegaran, juga dikenali 'Ayah'. Semasa saya sampai di 7-Eleven, dan semasa saya masih dalam kereta menunggu 'Ayah', saya nampak seorang lelaki India datang ke kereta saya, menuju ke sebelah kereta saya dan telah meminta saya turun dari kereta kerana lelaki India tersebut ingin cakap dengan saya. Kemudian saya telah beritahu dia bahawa saya tidak mengenalinya tetapi saya cuma ingin bercakap dengan kawan saya bernama 'Ayah'. Kemudian saya telah beritahu dia dan saya menoleh ke belakang untuk menengok kawan saya bernama 'Ayah'. Semasa itu, saya nampak seorang lelaki Melayu mengacukan pistol ke leher saya. Kemudian pegawai polis Melayu menyuruh saya mengalih kedudukan saya ke sebelah pemandu dan terus menggarikan saya. Lelaki India yang menggarikan saya. Lelaki India itu saya tidak kenali masa itu, tetapi selepas itu saya tahu nama lelaki itu ialah Sjn Mejar Sreetharan.

According to his testimony, he was arrested by SP3. SP3 had given evidence that he had arrested the accused at the public phone booth. SP3 had agreed that a person by the name of Sathiaseelen was arrested at the same occasion. The relevant cross examination is as follows:

> Pada tarikh tersebut adakah orang awam lain ditangkap di kawasan itu?
>
> Ada.
>
> Siapa dia?
>
> Satu lagi team dari Bukit Aman ada buat tangkapan di kawasan itu.
>
> Kamu tahu?
>
> Saya tahu satu laki-laki India dengan nama panggilan 'Ah Pui' kena tangkap di kawasan itu.

A Tahu nama penuhnya sekarang?

Saya tidak pasti — cuma tahu 'Sathiaseelen'.

Tahu siapa menangkapnya?

Team diketuai oleh Insp Ng Soon Wah.

Semasa menangkap OKT — selain Sathiaseelen, ada lagi seorang digelar
B 'Ayah' ada di sana?

Saya tidak tahu.

Dari P6 — boleh tunjuk di mana Sathiaseelen ditangkap?

Di hadapan 7-Eleven.

C It was never put to SP3 that he was the person who arrested Sathiaseelen. Nor was it applied he be recalled to be cross-examined when Sathiaseelen gave the above evidence. SP3 had clearly stated that another team led by Insp Ng Soon Wah arrested Sathiaseelen. In the circumstances this evidence of Sathiaseelen cannot be given the credence it might otherwise have been given.

D In his cross examination on Friday he said that he had gone out with the accused six to seven times, and that if the accused were in difficulty he would help him. In re-examination the following Tuesday he qualified it to say that if any offence is involved he would not help the accused. The evidence of the accused and Sathiaseelen shows the relationship to be an informal one where Sathiaseelen would pay the accused for helping him. He
E admitted that the explanation of getting the accused to hold the envelopes only while he went to meet his friend was not reasonable:

> Saya kata adalah tidak munasabah kamu beri dadah itu kepada Kesavan hanya untuk memegangnya kerana kamu sendiri boleh membawanya dalam kereta kamu dengan meninggalkannya dalam kereta atau sendiri memegangnya
F kemudian? Setuju atau tidak? [Saksi minta soalan diulangi.]
>
> Setuju.

In his evidence Sathiaseelen gave evidence that:

> Saya tidak setuju saya ada beri upah RM50 kepada OKT untuk hantar dadah.

G This is clearly in response to the answer by SP3 in cross examination:

> Cadang bahawa kamu sendiri menyoal Sathiaseelen, Sathiaseelen telah beritahu dia sendiri tidak tahu isi kandungan tersebut.
>
> Tidak setuju. Sathiaseelen ada bagi tahu saya OKT tahu apa yang dia buat dan Sathiaseelen ada mengakui Sathiaseelen ada beri RM50 kepada
H OKT.

It was not put to SP3 when he gave the above answer that it was not true that Sathiaseelen admitted he had given RM50 to the accused. SP1 had been cross examined as follows:

> Ada Sathiaseelen jelaskan mengapa dia beri RM50 itu?
>
I Ya dia ada menjelaskan tujuan, iaitu untuk OKT hantarkan kedua-dua sampul itu kepada seseorang.
>
> Cadang Sathiaseelen sebenarnya tidak memberi penjelasan seperti itu?

Tidak setuju.

Cadang tujuan RM50 diberi adalah kerana hubungan mereka yang sedia wujud — Sathiaseelen sedang berkerja manakala OKT seorang penuntut dan kerja sambilan sebagai pencuci kereta?

Ini saya tidak tahu. Saya hanya tahu apa diberitahu kepada saya oleh Sathiaseelen.

Notwithstanding the above, the accused did not say whether he was or was not given RM50 by Sathiaseelen on that day. He was cross-examined:

Saya kata Sathiaseelen janji beri upah RM50?

Tidak ada janji dalam kata upah. Beliau hanya beritahu saya selepas balik ke rumah dia akan beri saya RM50.

Betul Sathiaseelen beri kamu RM50?

Saya tidak terima apa-apa wang pada hari itu.

Tadi kata Sathiaseelen beritahu selepas balik ke rumah dia akan beri RM50?

Betul.

Setuju dia tidak akan beri duit begitu sahaja tanpa apa-apa sebab?

Tidak semestinya.

Setuju RM50 diberi sebagai upah hantar dadah itu?

Tidak setuju.

A little confusingly, counsel in re-examination asked:

Tadi kata pada 23 Jun 1998 Sathiaseelen ada beri RM50?

Dia tidak ada beri saya RM50 hari itu.

Assuming counsel's question arose because he might have misheard the accused's answer to the cross examination, there remains the fact (a) SP3's answer was not challenged as untrue or incorrect; and (b) the cross examination against SP1 suggests that RM50 was paid but for a different reason. The reason given was that it was because of their relationship, that the accused was a student and works part-time washing cars. Yet that suggestion put forth against SP1 was (a) not borne out by the evidence of the accused who said he did not receive anything, and (b) not borne out by Sathiaseelen who did not say he would give RM50 to the accused because of their relationship. The relationship was a tenuous one, the accused and Sathiaseelen having gone out six to seven times only. The confusion between the defence put out in cross examination of the prosecution witnesses and the evidence of the accused and Sathiaseelen, the failure to challenge SD3 that his testimony that Sathiaseelen told him he paid the accused RM50, and a similar testimony from SP1 even though challenged, require the issue to be further considered. The purpose of an act by an accused in a matter of inference from what he did: *Ong Ah Chuan v PP.* Being paid RM50 to assisSathiaseelen with the envelopes is more consistent with and explains why the accused did not ask any questions when he was dropped off to wait at the public telephone booth with the two envelopes 40m away upon the admitted unreasonable excuse that Sathiaseelen had to meet a friend.

Like the accused, Sathiaseelen is a witness who gave clear and deliberate answers to questions put to him. The answers portray a person who knew exactly what he was doing and gave answers to explain away as questions were put to them. For that reason, parts of their versions of events were not only not put to the relevant prosecution witnesses, but also there were contradictions between their evidence and the defence versions earlier put to the prosecution witnesses.

To summarise, the thrust of the evidence of Sathiaseelen is to support the defence that Sathiaseelen did not know what was in the envelopes, so as to raise a reasonable doubt that the accused did not know what was in the two envelopes. But this evidence cannot stand against the evidence of SP3 that the accused knelt, wept and asked for help from SP3 before and while the envelopes were being opened. Considering that (a) the defence had at first sought to deny that the kneeling, weeping and asking for help happened, and came up with a fresh version after the close of the prosecution case, that he only wept and asked for help after the envelopes were opened; (b) the defence that a period of about 20 minutes elapsed between arriving at the public telephone booth before he made his telephone call to Sathiaseelen was never put to SP3 who said that the accused arrived, placed the envelopes on the telephone box, called twice, put down the handset and walked out with the envelopes, one can only conclude these two essential parts of the defence story were made up only after the prosecution case was closed.

Having given the question much consideration, I had no hesitation in concluding that the version as related by the defence was a clever invention consistent with innocence embroidered upon existing facts by an intelligent person, after having heard the prosecution evidence. It shows a version of events that is possible, but, given all of the facts and circumstances of this case, is not in the least probable, and as such does raise a reasonable doubt against the prosecution case. Having so found, upon a consideration of all of the evidence before it, that the prosecution had proved its case beyond reasonable doubt, the court found the accused guilty as charged and convicted the accused of trafficking in 11.8gm of heroin and 5.2gm monoacetylmorphine on the 23 June 1998 at about 4.35pm at Jalan Jambu Golok, Taman City, Jalan Kuching, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) thereof. The sole punishment under s 39B(2) being the death penalty, the court sentenced the accused to death and directed that the accused be hanged by the neck until he be dead as prescribed by s 277 of the Criminal Procedure Code.

Accused sentenced to death.

Reported by Andrew Christopher Simon